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TSAI CHEE JUNG

v.

PELITA LEISURE SDN BHD

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HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[CIVIL APPEAL NO: 12-48-2006-III]
20 APRIL 2007

C ***CIVIL PROCEDURE:*** *Pleadings - Cause of action - Misappropriation of money by defendant - Standard of proof - Whether 'beyond reasonable doubt' - Whether sessions court judge committed an error in applying balance of probability test - Whether misappropriation of money by defendant established*

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The plaintiff/respondent had sued Tsai Chee Jung, the defendant/appellant (appellant) for a sum of RM180,189.38. The lower court after a trial gave judgment for the plaintiff for the sum claimed resulting in this appeal by the appellant. Counsel on both sides agreed with the court that the fate of this appeal depended on whether the sessions court judge (SCJ) had used the correct standard of proof. The appellant contended that since the plaintiff had alleged misappropriation of money, the burden of proof was not one of probability but the criminal burden of beyond reasonable doubt, relying on the case *Ang Hiok Seng @ Ang Yeok Sng v. Yim Yut Kiu.*

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Held (dismissing the appeal):

(1) From the pleadings, the plaintiff's cause of action was one of misappropriation of money by the defendant. Thus, this court was bound by the case of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu* to hold that the applicable standard of proof was one of beyond reasonable doubt. The SCJ hence had committed an error in applying the balance of probability test. (para 5)

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(2) The plaintiff had proved 'beyond reasonable doubt' that the defendant had misappropriated the sum of RM180,189.38 due to, *inter alia*, these reasons: (i) the bank in slips had been fabricated as testified by the officers of the bank and (ii) there was evidence that the appellant by his own admission had pre

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filled the bank in slips. Thus, the misappropriation of the RM180,189.38 by the defendant had been established. (para 11)

Case(s) referred to:
Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***
Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 20 FC ***(refd)***
CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA ***(refd)***
Chu Choon Moi v. Ngan Sew Tin [1986] 1 MLJ 34 ***(refd)***
Eric Chan Thiam Soon v. Sarawak Securities Sdn Bhd [2000] 4 CLJ 464 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 29

For the appellant - Sunni Si; M/s Si & Assoc
For the respondent - John Shek; M/s John Shek, Sigar, Wei Yee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Introduction

[1] Pelita Leisure Sdn. Bhd., the plaintiff in the court below and the respondent here, had sued Tsai Chee Jung, the defendant/appellant (appellant), for a sum of RM180,189.38. The lower court after a trial gave judgment for the plaintiff for the sum claimed resulting in this appeal by the appellant. In the memorandum of appeal, the appellant listed 11 grounds.

[2] At the hearing of this appeal on 8 March 2007, counsel on both sides agreed with the court that the fate of this appeal depends on whether the Sessions Court Judge (SCJ) had used the correct standard of proof. There is no dispute by either counsel that the SCJ had applied the balance of probability test and this can be seen when she concluded that "it was more probable than not that the defendant misappropriated the plaintiffs' monies which were entrusted to him for banking ..."

Standard Of Proof

[3] Mr. Sunni Si (Mr. Si), counsel for the appellant, had contended that since the plaintiff had alleged misappropriation of money, the burden of proof is not one of probability but the criminal burden of beyond reasonable doubt and relied on the case of *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 (FC) where the Federal Court there held:

> (3) Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, **misappropriation of money or criminal breach of trust,** it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal fraud in civil or criminal proceeding cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a balance of probability is applicable. In this case, since the allegation of fraud was purely civil in nature and not based or connected with a criminal offence, the civil standard was applicable. (emphasis added)

[4] Whether or not the cause of action in this case falls within the definition of criminal fraud depends on what is stated in the statement of claim which states as follows:

IN THE SESSIONS COURT AT KUCHING
IN THE STATE OF SARAWAK, MALAYSIA

SUMMONS NO.

BETWEEN

PELITA LEISURE SDN. BHD.
(Co. No. 212022-D)
B1-13 Hock Lee Centre
Jalan Abang Abdul Rahim
93100 Kuching ... Plaintiff

AND

TSAI CHEE JUNG
(BIC K.0098809/WN KP 660728-13-5631)
Block AJ 308 MJC Tingkat 2
Jalan Batu Kawa
Kuching ... Defendant

STATEMENT OF CLAIM

1. The Plantiff is a company incorporated and registered under the Companies Act 1965 in Malaysia and having a registered office at B1-13 Hock Lee Centre, Abang Abdul Rahim 93100 Kuching. (hereinafter referred to as "the said House").

2. The Defendant was formerly an employee of the Plaintiff working as an Operations/Administration Manager and Director (entrusted with all the responsibilities including the payments of money into Banks) earning RM58,000.00 more or less per year.

3. Sometime early in midst April 2003 the Plantiff made a surprised check on the Company's accounts and found out that a sum of RM180,189.38 which was supposed to be deposited into the Company's bank account in Public Bank Bhd. Kuching had never paid into the said account by the Defendant.

PARTICULARS

Months	**Date**	**Amounts**
July 2002	02-07-2002	12,396.00
	03-07-2002	14,021.90
	16-07-2002	8,333.00
August 2002	01-08-2002	4,637.30
	26-08-2002	12,981.00
	30-08-2002	4,149.00
October 2002	07-10-2002	15,303.00
	14-10-2002	8,320.50
	21-10-2002	15,652.00
November 2002	01-11-2002	7,406.70
	04 -11-2002	10,067,00
	08 -11-2002	5,000.00
	27-11-2002	3,885.20
December 2002	02-12-2002	9,139.00
	07-12-2002	10,804.78
	18-12-2002	8,000.00
	20-12-2002	8,563.00
February 2003	24-02-2003	21,530.00
		180,189.38
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4. An investigation was carried out and it was found out that the Defendant had used banking slips which he endorsed on behalf of the Public Bank Bhd. Padungan Branch, Kuching (hereinafter referred to as "the said Bank").

5. A check also had been made with the said Bank and the Manager of Public Bank Bhd, Padungan, Branch had confirmed that no such sum of money RM180,189.38 had over been paid into the said bank account by the Defendant.

6. The Defendant admitted that he used the banking slips but he never paid the money into the said Bank but endorsed on behalf of the said Bank and kept the money for his own use.

7. The Defendant tendered his immediate rcsignation as Manager and Director of the Plantiff's company on the 1/5/ 2003 without stating any reason.

8. A Police report to that effect was lodged by the Plaintiff at the Padungan Police Station, Kuching vide report No. PAD/ 1530/ 2003, Investigation is still pending.

9. Despite of repeated verbal and written demands the Defendant failed, neglected and refused and stil fail, neglect and refused to pay the Plaintiff and misappropriated sum RM180,189.38.

AND the Plaintiff claims:

(i) Judgment sum RM180,189.38.

(ii) Interest at the current banking rate from the that of misappropriation till judgment and thereafter at the rate of 8% per annum from the date of judgment till full settlement.

(iii) Cost. Client and solicitor basis.

(iv) Any other order as this Honourable Court deems fit and proper.

Dated this 3rd day of September 2003.

...

JOHN SHEK, SIGAR, WEI YEE & CO.

Advocates for the Plaintiff

[5] From the pleadings, one can see that the plaintiff's cause of action is one of misappropriation of money by the defendant. That being the case, I am bound by the case of *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased) (supra)* to hold that the applicable standard of proof is one of beyond reasonable doubt. The SCJ hence had committed an error in applying the balance of probability test. To be fair to the SCJ, Mr Si in his submission in the court below had submitted that the standard of proof was one of a balance of probability.

[6] In my view this oversight by counsels and the SCJ was caused by the fact that they were overly concerned with a civil case which normally applied the balance of probability test. Even if they were aware that a different test applies, they may have some difficulty in differentiating between a civil fraud and criminal fraud. A perfect example of this is the recent case of *CGU Insurance Bhd. v. Asean Security Paper Mills Sdn. Bhd.* [2006] 2 CLJ 409 which concerned a fraudulent claim for destruction of a property by fire. In the Court of Appeal, the three learned judges unanimously found that it was a civil fraud and at p. 458 said:

> We would observe that the fraud alleged here is that the respondent was making a claim for destruction of its property by a fire caused by spontaneous combustion when in fact the property was destroyed in a fire that was self inflicted. Put in another fashion, what the respondent was saying to the appellant was this; 'My property was destroyed in a fire for which I was in no way responsible. So you must pay me under the policy I took out with you'. This is nothing more than a representation of a set of facts as being true. The appellant refused to pay because this, it said, was a fraudulent representation. The truth, according to the appellant is that the property was set fire to and destroyed on purpose. Now, when viewed in this way – and that is the way in which the learned judge ought to have viewed it – we are in agreement with the appellant's submission that this is a case of civil fraud and not criminal fraud. Accordingly, it is our judgment that the learned judge misdirected himself on the required standard of proof.

[7] However on appeal before the Federal Court (*Asean Security Paper Mills Sdn. Bhd. v. CGU Insurance Bhd.* [2007] 2 CLJ 20), the court also by a unanimous decision found that it was a criminal fraud. This is what the Federal Court said:

> It is now settled law that the standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities (see *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 FC). Thus, it is rather perplexing on the part of Court of Appeal to come to a finding that the available circumstantial evidence satisfies both the standards like balance of probabilities and beyond reasonable doubt. Indeed, the stance taken by the Court of Appeal is surprising, and not only reflects a departure from the Federal Court's latest binding precedent but perhaps also a lack of appreciation as to the required standard of proof in a civil proceedings focusing on criminal conduct.

[8] Hence I find it understandable that the learned judge in *Eric Chan Thiam Soon v. Sarawak Securities Sdn. Bhd.* [2000] 4 CLJ 464 said:

> Since 'civil fraud' comprised cases of 'criminal fraud' under the Penal Code (by virtue of s. 17(e) of the Contracts Act), this distinction of 'civil fraud' and 'criminal fraud' cannot hold and it is, in my humble opinion, an attempt at distinguishing the undistinguishable since 'fraud' by its incorporation of the offences under the Penal Code where fraud is an element has the same meaning whether in criminal or civil cases and they are 'criminal fraud'. 'Fraud' has been described as – 'dishonesty of some sort' (*PJTV Denson (M) Sdn Bhd & Ors v. Roxy (M) Sdn Bhd* [1980] 2 MLJ 136); ... The legislature should step in and pass a law to say that in all civil proceedings the burden of proof in respect of all matters is that of on a balance of probabilities. This would put an end to the irreconcilable decisions of the highest court instead of leaving the matter to successive courts to try and extricate itself from the insoluble problem and which leads to more problems and more uncertainty in the law. I am all for a single standard of proof on a balance of probabilities in civil proceedings and I said so in *Hock Hua Bank (Sabah) Bhd v. Lam Tat Ming & Ors* [1995] 4 MLJ 328 where I have referred to the various conflicting decisions of our courts.

[9] I come back to this appeal which under the law is by way of a rehearing (see s. 29 of the Court of Judicature Act). The burden lies with me to look at the printed evidence together with the observations of the SCJ on the credibility of witnesses to determine whether the respondent had proved its case beyond reasonable doubt. This burden in my view does not require me to look at which offences under the Penal Code the appellant is alleged to have committed and determine whether all the elements

in the Penal Code section had been satisfied as in a criminal trial. What then is required of me? In *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34, the Supreme Court held at p. 38:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v. Official Assignee Rangoon* AIR [1941] PC 93; *Saminathan v. Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular cases. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see 'proved' at s. 3 of the Evidence Act 1950 and *Liew Kaling & Ors v. PP* [1960] MLJ 306). In the present appeal before us, the facts and circumstances of the case in relation to the part played by the respondent point to the probability that any prudent man would under circumstances accept it to be fraudulent.

[10] I also seek guidance from the approach used in the Court of Appeal's judgment in *CGU Insurance Bhd v. Asean Security Paper Mills Sdn. Bhd.* [2006] 2 CLJ 409, (though overruled but only to the extent of applying the wrong standard of proof) which are as follows:

> Assume for a moment that we are wrong. Assume that the correct standard to apply in this case is the criminal standard of proof: that is, proof beyond reasonable doubt. Yet we are satisfied that on an objective assessment of the facts and having regard to the totality of the evidence in this case, there is sufficient evidence of circumstances from which an inference of fraud may be drawn. Before we set out the relevant facts and circumstances here, we would state that in our judgment proof of fraud beyond reasonable doubt does not mean proof beyond any doubt or the shadow of a doubt. While mere suspicion is insufficient, it is not the law that a litigant who alleges fraud must unravel each and every act of the person accused of fraud. Like any other fact, fraud may be inferred from circumstantial evidence with the added proviso that there must be a foundation of evidence and not mere suspicion. We would, in this context refer to *Satis Chandra Chatterji v. Satish Kantha* AIR [1923] PC 73 where Lord Atkinson said:

> Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them – proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape.

In *Transport Industries Insurance Co Ltd v. Longmuir* [1997] 1 VR 125, the insured had been acquitted on a charge of arson. Yet the insurance company refused to pay his claim. The circumstances there were that the insured's house was damaged in a fire which had been deliberately lit. There was a large body of circumstantial evidence that the insured had lit the fire, including that he was on the property immediately before the fire started, that he had stored there a large amount of petrol, which had been used to start the fire, and that he was in the midst of a bitter matrimonial dispute which involved the property. The trial judge found for the plaintiff insured. The defendant insurer appealed. The Court of Appeal of the Supreme Court of Victoria allowed the appeal, holding that the trial judge had erred in considering each item of circumstantial evidence in isolation from the others and seeking to determine whether the ultimate fact could be inferred from each such item of evidence. The following passages in the judgment of Winneke P are instructive:

> (i) It seems to me, however, that his Honour deprived himself of the opportunity of assessing the full impact of these evidentiary facts by engaging in a false process of reasoning. Rather than considering what inferences flowed from the combination of evidentiary facts which were not in contest, the learned judge appears to have treated each of the individual evidentiary facts as if it were the ultimate factum probandum; in the sense that unless, when analysed, it was capable by itself of supporting the inference that the respondent was responsible for lighting the fire, it should be discarded without regard to the support which such fact might have received from other facts.

(ii) It was, in my view, an inevitable consequence of isolating the individual facts, and analysing each to determine whether it was consistent with proof of the ultimate fact that the respondent lit the fire, that the learned judge imposed upon the appellant an onus and standard of proof which was inappropriate in the circumstances. The task of the learned judge was to consider the weight of the combination of facts proved to his satisfaction and then to determine whether the combined weight of those facts and circumstances supported the inference, as a matter of probability, that the respondent lit the fire. The onus of proof is only to be applied at the final stage of the reasoning process. It is, erroneous to divide the process into stages and, at each stage, apply some particular standard of proof. To do so destroys the integrity of circumstantial case, as the Court of Criminal Appeal in South Australia pointed out in *R v. Van Beelen* [1973] 4 SASR 353 at p 374: '... the requirement of proof beyond reasonable doubt relates to the final stage in the process; the jury is not ... required to split up the various stages in the process of reasoning leading to the conclusion of guilt beyond reasonable doubt and to apply some particular standard of proof to each of those steps ... and to instruct them to do so would ... be confusing and possibly misleading and would tend to the imposition of an artificial and scholastic strait-jacket on their deliberations.

[11] Adopting the above approach, I examined the evidence and the judgment of the SCJ with utmost care and came to the conclusion that the plaintiff had proved "beyond reasonable doubt" that the defendant had misappropriated the sum of RM180,189.38 and the reasons for my conclusion are these:

1. The bank in slips of Public Bank had been fabricated as testified by the officers of the bank. This is not disputed.

2. There was evidence that the appellant by his own admission had pre filled the bank in slips.

3. There was a meeting between the appellant and the respondent at the Kentucky Fried Chicken outlet at MJC Batu Kawa on 1 May 2003 which resulted in the appellant giving a letter of resignation with a promise to repay the debt over a period of six installments (P9). The appellant's evidence on the signature in P9 as correctly pointed out by the SCJ was inconsistent. This is what she said:

> "Another example of the defendant's shifting of evidence is paragraph 13 of his statement in which in one paragraph he managed to contradict himself badly. He said that the letter of resignation was not signed by him. Yet in the very next sentence he accused Mr Chai Min Foh of using a blank sheet presigned by him in March 2003 in order to apply for a work permit of one worker, admitting therefore that the signature was indeed his but the content of the letter was not his". Furthermore it is unreasonable to conclude that PW4 would fabricate P9 to incriminate his own nephew. And as pointed out by the learned Sessions Court Judge there was no evidence as to why he should fabricate P9.

4. The findings of the SCJ on the worth of the appellant's evidence. She after reviewing the evidence concluded as follows:

> All these discrepancies and improbabilities add up to persuade me to view as I said earlier, the defendant's evidence with extreme suspicion bordering on outright disbelief. The conclusion that I am forced to make is that he was not his own reliable witness and his evidence was tainted with negativities which would render it really unsafe for me to rely on.

I wish to add here that the SCJ's conclusion was reached based on her detailed analysis of the evidence adduced, her observation of the demeanor of appellant and not on mere conjecture.

5. The SCJ's decision to treat the non production of the daily record of the takings as testified by PW2 as immaterial cannot be faulted as there are other evidence to establish that there was this missing sum of RM180,189.38. Once she was satisfied that P9 was genuine, the misappropriation of the RM180,189.38 by the defendant had been established.

6. The SCJ's assessment of the evidences of PW2 and PW4 cannot be ignored. This is how she put it:

> Further my assessment of both PW2 and Mr Chai Min Foh (in particular PW2 in respect of this issue) is that they were witnesses of truth. PW2 need not have to lie "to protect her own boss" as alleged by the defendant at the end of his cross-examination because she was no longer in that "boss" employment. She has left the plaintiff's

company, not a week or a month before the trial but more than a year before the trial. I am therefore satisfied that she had no vested interest in the plaintiff company when she gave evidence and her credibility as a witness was not destroyed by any major discrepancies in her evidence nor was shaken by cross examination. The same can be said of Mr Chai Min Foh. The defendant was his own nephew. He trusted him with the management of his company and the defendant's allegation that the charges of misappropriation were leveled at him because his uncle wanted to save cost was quickly demolished by his own admission that the company was doing well.

[12] Accordingly, I dismiss this appeal with no order as to costs.